

Manuscript version: Author's Accepted Manuscript

The version presented in WRAP is the author's accepted manuscript and may differ from the published version or Version of Record.

Persistent WRAP URL:

<http://wrap.warwick.ac.uk/109409>

How to cite:

Please refer to published version for the most recent bibliographic citation information. If a published version is known of, the repository item page linked to above, will contain details on accessing it.

Copyright and reuse:

The Warwick Research Archive Portal (WRAP) makes this work by researchers of the University of Warwick available open access under the following conditions.

Copyright © and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable the material made available in WRAP has been checked for eligibility before being made available.

Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

Publisher's statement:

Please refer to the repository item page, publisher's statement section, for further information.

For more information, please contact the WRAP Team at: wrap@warwick.ac.uk.

Global constitutionalism and East Asian perspectives in the context of political economy

(forthcoming in M. Kumm, A. Peters, T. Suami and D. Vanoverbeke (eds), *Global Constitutionalism from European and East Asian Perspectives*, CUP 2018)

Christine Schwöbel-Patel*

Abstract

This chapter looks at the question of global constitutionalism and East Asia in a context of political economy. It raises the concern about the mutually reinforcing relationship between global constitutionalism and neoliberalism. This nexus is explained as lying in the insistence of the separation of the public and the private in both constitutionalism and neoliberalism. It is considered whether global constitutionalism's predisposition towards neoliberalism (in the sense of a privileging of the separation of the state from the market and with that a separation of the political from the economy) would be strengthened and deepened through its extension to East Asia. Or, alternatively, could this new dialogue provide an opportunity for 'decolonising' global constitutionalism and its political economic bias?

Introduction

Global constitutionalism is, in a manner of speaking, uncharted territory for East Asia. In the following, I explore the potential consequences of expanding the debate on global constitutionalism to East Asia. While there is the potential of enriching the debate through this geographical expansion, there is also a danger that it could further naturalise an already dominant form of political-economic organisation, namely neoliberalism.

Not only has political economy been a neglected site of inquiry in the debate on global constitutionalism, and therefore merits further exploration in itself, it is an issue which becomes particularly pertinent in conversation with East Asian perspectives on global

* Senior Lecturer, University of Liverpool, C.Schwobel@liverpool.ac.uk. Many thanks to Robert Knox for comments on an earlier draft. All websites were last visited on 23 March 2017.

constitutionalism.¹ The argument is built on the assumption that consensus between Western and Asian actors is often sought in commercial relations (doing business together). On this assumption, a consequence of a global constitutional debate could be the further depoliticisation of the dominant mutual language of business.

It is no secret that global constitutionalism has, to date, been a debate largely confined to European origins and audiences, with particular enthusiasm expressed by German scholars.² It is also no secret that the debate on global constitutionalism has largely been a values-oriented debate, foregrounding the search for a common normative agenda.³ Superficially, these two features of the dominant global constitutional orientation already have exclusionary effects for East Asian scholars and practitioners: Seemingly, it is a debate taking place outside of its geography, and given the foregrounding of both territorial sovereignty and an enduring ‘Asian values’ understanding of several East Asian states, a universal norms debate is politically (and ideologically) seemingly a dead-end. Depending on one’s point of view, one could label this type of exclusionary effect as ‘hegemony’, a colonial hangover from the Western perspective. Alternatively, one could label it as nationalist and isolationist from an East Asian perspective. Regardless, the global constitutional debate in an East Asian context does, to date, not carry much momentum. The unequal distribution of global constitutional scholars in Europe vis-à-vis other parts of the world appears to be perpetuating this exclusionary effect. This collection of essays is therefore very welcome in beginning a debate which extends beyond this geographical (and ideological) bias. And yet, apart from a positive diversifying of the debate, it also seems that much is at stake with this conversation.

This chapter voices the concern that the dialogue on global constitutionalism between

¹ As with all geographical and cultural references of this scope, the term ‘East Asia’ is difficult to define or to fix. East Asia is often taken to mean the ten ASEAN member countries (Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam), and China, Japan and Korea, the so-called ASEAN Plus Three. Depending on the issue, it may include some neighbouring countries. Tamio Nakamura (ed.), *East Asian Regionalism from Legal Perspective: current features and a vision for the future* (London: Routledge 2009). According to the Project Framing Paper, this project is particularly interested in the ASEAN Plus Three. (Framing Paper on file with the author).

² Among others, see work by Bardo Fassbender, Andreas Fischer-Lescano, Matthias Kumm, Stefan Oeter, Anne Peters, Antje Wiener, and this author included.

³ This includes ideas of particular human rights, *jus cogens* norms, and other treaty norms as constitutional. Notwithstanding an emphasis by some authors on procedure over substance (see Anne Peters, ‘Constitutional Fragments: On the Interaction of Constitutionalization and Fragmentation of International Law’ *Centre for Global Constitutionalism University of St. Andrews Working Paper 2015*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591370).

international lawyers from the West and international lawyers from East Asia could further naturalise neoliberal biases and forms of organisation. My concern about this potential is based on two observations: First, that the dominant ideas of global constitutionalism, although diverse and multiform, all share the liberal tenet of the separation between public and private authority, which is mapped onto a separation of political and economic activity and state and civil society. This separation privileges the deregulation and ultimately the depoliticisation of private economic activity – one of the main precepts of neoliberalism. Given that the conversation with East Asian international lawyers on global constitutionalism is unlikely to take place on the footing of a common values debate (regardless of whether this is a good or bad thing), it means that a debate would most likely take place on an economic basis. Despite the differences between the states in question and their approach to political economy, they nevertheless appear to agree on the division of political and economic activity in law and international relations.

The second observation concerns the almost universal reach of neoliberalism as the dominant business model as well as its pervasiveness beyond business, reaching to all aspects of life. Neoliberalism is a term commonly used to describe the political-economic form of organisation which prioritises private property and enterprise over public goods, has a preoccupation with markets and profits, with the individual (and individual freedoms), furthers a declining appreciation and understanding of ideas of community and commonality, and consequently the domination of a small class of ruling elite who have gained and maintained their wealth at the expense of the rest. These priorities are not only evident in commercial relations (the so-called private sphere of legal relations) but are also becoming more and more evident in previously public spaces such as health care, education, and other public and social services. East Asia occupies an interesting space here – and certainly China’s economic model of a so-called socialist market economy could not be described as neoliberalism in the ‘Washington Consensus’ sense of the term.⁴ What the East Asian economies, including China, have in common with neoliberalism, however, is a general consensus on ‘the need for less government

⁴ The Washington Consensus is a set of economic policy prescriptions agreed upon by the International Monetary Fund (IMF), the World Bank, and the US Treasury Department (all based in Washington DC) which promote a strongly market-based approach to international relations and development.

intervention in the economy and greater political openness'.⁵

Could, therefore, a dialogue between East and West on global constitutionalism have the effect of strengthening the global appeal of neoliberalism? Global constitutionalism in this sense would act as a vehicle for neoliberalism, squeezing out any space for resistance or dissent. Or, alternatively, and more optimistically, does this dialogue provide an opportunity? Given the differing economic and political means of organisation, could global constitutionalism, through an impetus from East Asia, be 'decolonised', freeing it of its liberal-democratic assumptions, bringing the economic into political debates and ultimately providing a space for considering alternative political-economic models?

1. Global constitutionalism and international law and political economy

Establishing a link between global constitutionalism and political economy arguably becomes clearer with a step-by-step analysis of (a) enquiring into the link between global constitutionalism and international law, then (b) the link between international law and political economy and finally (c) the relationship between global constitutionalism and political economy.

1.1 Global constitutionalism and international law

The debate on global constitutionalism is interdisciplinary, spanning political theory, international relations, social sciences, and international law. However, much of the debate and many of the leading voices in the debate are rooted in international law.⁶ This provides global constitutionalism with a distinctly normative, as opposed to a descriptive, flavour. The debate on global constitutionalism is, therefore, largely about questions of how constitutional features (the rule of law, democracy, human rights) can be applied in a global context for standard-setting and problem-solving purposes. The question at the heart of this is: Can global constitutionalism contribute to addressing some of the world's largest problems? In other words, can it contribute to a more equal, prosperous, sustainable, and overall better life for humankind? And it is laudable to pose these questions. These are, after all, a set of questions which demonstrate a desire for harmony among people based on a common fabric, whatever that may be. On this basis, global

⁵ He Li, 'The Chinese Path of Economic Reform and Its Implications' (2005) 31 *Asian Affairs* 195.

⁶ Influential scholars from outside international law include Anthony Lang, Antje Wiener, Michael Zürn.

constitutionalism has been described as one of the ‘master narratives’ of international law, which attempts to construct ‘meaningful totalities out of scattered events.’⁷

I have previously argued that, although diverse and multiform, the predominant global constitutionalism projects from an international legal perspective share some important properties in the privileging of: (a) the limitation of power, (b) the institutionalisation of power, (c) social idealism (meaning an idea for the future based on societal values), (d) the standard-setting capacity of constitutions in the sense of a systematisation of law, and (e) the recognition of individual rights.⁸ In these constitutional traditions, the listed features all form part of public law, i.e. the area of law which is regulated by the state and concerns relations between the state and individuals. Together, these features can further be condensed to a general *liberal democratic* idea of global constitutionalism as the pre-eminent interpretation of global constitutionalism among international lawyers today.⁹ This should, in and of itself, not be surprising. It is after all the extrapolation of national constitutional principles, largely originating in the French Constitution of the first French Republic, the United States Constitution, and the post World War II German Constitution, which have been reproduced in many constitutions across the world.

However, these constitutional principles need to be placed into both a colonial as well as an ideological context. Although it may not be directly intended by the participants to the debate, global constitutionalism has the potential to act as a vehicle of hegemony through the engagement of a *civilising rhetoric*. Global constitutionalism is an idea which purports to be universal, yet it is a debate largely originating in Europe and entrenched in European Enlightenment thinking. It therefore sits comfortably in a progress narrative which subscribes to the progressive nature of European legal thought and suggests the application of this thought to the non-European world. The *legal* nature of this form of universalism is important since it implies a form of sanction/enforcement should a violation/non-compliance be determined.

⁷ Matthew Windsor references Ricoeur’s distinction between narrative’s successional (progress) and configurational (totalities) dimensions in this context. Matthew Windsor, ‘Narrative Kill or Capture: Unreliable Narration in International Law’ (2015) 28 *Leiden Journal of International Law* 748. See Paul Ricoeur, ‘The Narrative Function’, in John B. Thompson (ed.), *Hermeneutics & The Human Sciences* (Cambridge: Cambridge University Press, 1981), p. 274. I would argue that constitutionalism has both successional as well as configurational dimensions.

⁸ Christine Schwöbel, *Global Constitutionalism in International Legal Perspective* (Leiden: Martinus Nijhoff/Brill, 2011).

⁹ Schwöbel (n. 8).

As we have learned from recent scholarship in international law, the discipline and its central principles were not only constituted by asymmetries of power between colonial powers and colonial subjects but continue to create and naturalise these asymmetries. Antony Anghie, a critical legal historian and leading figure of the critical orientation which calls itself Third World Approaches to International Law (TWAIL), argues that the international legal order was founded on a structural bias of differentiation between European and non-European states beginning in the 16th century. Anghie places the colonial encounter as a crucial time in which such differentiation was established. The European standard of civilisation was, as Anghie found, the standard by which non-European countries (in particular Latin American colonies) were measured. ‘Technical’ terms or terms of expertise, most notably ‘sovereignty’, helped institutionalise and naturalise a division between what was considered civilised and what was considered uncivilised. This ‘dynamic of difference’, according to Anghie, continues to be the basis of exploitation of the global South.¹⁰

Those sceptical of the contemporary relevance of hegemony and exploitation often refer to the consensual nature of international law, stating that treaties are entered into under the assumption of the parity of the parties involved. What this argument often overlooks are the hidden financial pressures (sometimes in the form of development aid), memoranda of understanding, and other dependencies which form the basis of these quasi-contractual and seemingly equal exchanges. Regardless of whether one is sceptical of the relevance of hegemony in the international sphere, it cannot be denied that global constitutionalism’s close relationship with the discipline of international law and its rhetoric of universalism offers a potent vehicle for the more problematic sides of Eurocentricism.

In the past years, perhaps as a response to the recognition of the Eurocentric nature of the global constitutional debate, there has emerged both a discontent about global

¹⁰ Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005). See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011); Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

constitutionalism,¹¹ as well as growing purchase of *pluralism* as opposed to *hierarchy* in constitutionalism. In light of a changed international and national landscape, Nico Krisch proposes a conceptualisation of pluralism to make sense of the new legal ordering. Instead of hierarchy, pluralism, according to Krisch, enables ongoing contestation and open-endedness for principles.¹² The rise of critical voices and the continued search for other legal principles to make sense of a diverse and decentered world, has led to global constitutionalism taking on a slightly different, less hierarchical tone.¹³ Some are already declaring the debate on global constitutionalism outdated.¹⁴ It seems, however, that there will continue to be rises and falls, trends and countertrends in this debate. Whether we are riding a wave of rising or of falling appeal to global constitutionalism will in part depend on what the most pressing issues of international law and politics are. In the current trend of increased nationalism, we may soon be experiencing a renewed interest in the supposedly unifying language of global constitutionalism. In any event, global constitutionalism remains a largely theoretical debate which is shaped by current affairs, even if this is unconsciously so.

1.2 *International law and political economy*

David Kennedy has observed that the central questions today are not political questions (regarding questions to be addressed by governments alone) and they are not economic questions (regarding questions to be addressed by the operations of markets alone) but rather they concern questions which can best be addressed by ‘thinking of politics and economics as intertwined projects and close collaborators in the distribution of political

¹¹ There are varying forms of critique and reengagement. Examples of a critical stance include Richard Collins, ‘Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law’s Past’ (2009) 22 *Leiden Journal of International Law* 251-288; Schwöbel, (n. 8); Kolja Möller, ‘Formwandel des Konstitutionalismus. Zum Verhältnis von Postdemokratie und Verfassungsbildung jedenseits des Staates’, (2015) *Archiv für Rechts- und Sozialphilosophie* 270-289.

¹² Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010); Alec Stone Sweet claims that the distinction between constitutionalism and pluralism is in fact a ‘false dichotomy’ A. Stone Sweet, ‘Constitutionalism, Legal Pluralism, and International Regimes’ (2009) 16 *Indiana Journal of Global Legal Studies* 621-645.

¹³ See also the recent special edition in the journal *Global Constitutionalism* on Julia Morse and Robert Keohane’s conception of ‘contested multilateralism’ and global constitutionalism (2016) 5 *Global Constitutionalism* 295-350. See also Julia Morse and Robert Keohane, ‘Contested Multilateralism’ (2014) 9(4) *Review of International Organizations* 385-412. Contested multilateralism concerns the claim that new institutions are developing to challenge the institutional status quo.

¹⁴ Global constitutionalism has been described as no longer ‘fashionable’, Thomas Kleinlein, ‘Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law’ (2012) 81 *Nordic Journal of International Law* 79-132.

authority and economic reward'.¹⁵ The political economy of international law is a topic which has only recently attracted attention among international lawyers, largely as a delayed response to globalisation and the attendant growth of relevant organisations and practices. In international law, this is mostly captured in the sub-disciplines of international economic law, as the law regulating cross-border and business transactions, and international investment law, as the law regulating behaviour of foreign investors and sovereign states. Jeffrey Dunoff and Joel Trachtman have argued that the relationship between globalisation (the process of an increase in the flow of people, capital, goods, services, and ideas across borders) and international law, is 'mutually reinforcing'. The activities associated with globalisation increase the demand for international law, particularly international economic law, and in turn international economic law facilitates the international flow of goods, capital, people and ideas.¹⁶ This mutual reinforcement implies a win-win situation for market liberalisation: Government restrictions become increasingly relaxed through a ceding of sovereignty to international organisations and rules, the environment for privatisation is improved through deregulation, competitive forces decide on the success or failure of enterprise, wages are suppressed. The state has a crucial role in this, at once expected to construct walls around the market as well as expected to not interfere with these walls once they are erected.

[The state] must set up those military, defence, police and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. [...] State interventions in markets (once created) must be kept to a bare minimum [...].¹⁷

International institutions have fixed these economic preferences and the role of the state in it in particular at the IMF, the World Bank, and the World Trade Organisation (WTO). This economic programme, associated with several post World War II phenomena and

¹⁵ David Kennedy, 'Law and Political Economy of the World' (2013) 26 *Leiden Journal of International Law* 7-48, at 7-8.

¹⁶ Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009), p. 5.

¹⁷ David Harvey, *A Brief History of Neoliberalism*, (Oxford: Oxford University Press, 2005), p. 2.

the Chicago economists Friedrich Hayek and Milton Friedman, is today mostly referred to as neoliberalism. Neoliberalism from this vantage point of structural programmes which become naturalised in the economic and then the non-economic sphere in order to protect the interests of a capitalist class is to be understood as a political project.¹⁸

It is worth noting that a strict adherence to this economic programme is largely recommended for and required of developing countries.¹⁹ While the Western industrialised countries often adopt protectionist measures (government subsidies, trade tariffs, restricted patents) which allow them to privilege some of their national products and services without subjecting them to the tough global competitive market.²⁰ US agricultural subsidies are one example of this double-standard. This is often described as socialism for the rich, capitalism for the poor.

As Claire Cutler expertly argues in *Private Power and Global Authority*, international law and neoliberalism are not only mutually reinforcing but the former is effectively rendering private economic activity ‘apolitical’ and neutral.²¹ Particularly since the end of the Cold War, globalisation has accelerated and taken on the cloak of neoliberalism. What was previously regarded as the economic theory, or even ideology, of neoliberalism has been transformed into common-sense. Constitutionalism comes into this equation as a governance project at the local, regional and global level. It is the ‘juridical foundation for the global expansion of capitalism’.²² Cutler and Gill identify the ways in which constitutionalism institutionalises neoliberalism at all these levels, employing the concept of ‘new constitutionalism’.²³ For them, ‘new constitutionalism’ is a project which institutionalises the huge contradictions and crises which form part of the neoliberal political project. The social forces and practices which constitute neoliberalism include, for example, increases in inequality, despite the accumulation of capital, and the

¹⁸ Harvey, *A Brief History of Neoliberalism* (n. 17), p. 2.

¹⁹ In the narrow meaning of the ‘Washington Consensus’ as set out by John Williamson in 1990 ‘to refer to the lowest common denominator of policy advice being addressed by the Washington-based institutions to Latin American countries as of 1989’ [www.cid.harvard.edu/cidtrade/issues/washington.html].

²⁰ Ha-Joon Chang, *Bad Samaritans: The Guilty Secrets of Rich Nations and the Threat to Global Prosperity* (London: Random House Business, 2008).

²¹ A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003).

²² A. Claire Cutler, ‘New constitutionalism and the commodity form of global capitalism’ in Stephen Gill and A. Claire Cutler (eds.) *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014), p. 45.

²³ Gill and Claire Cutler (eds.), *New Constitutionalism and World Order* (n. 22), p. 3.

socialisation of large investors and firms, despite the free movement of capital. But, Cutler and Gill also trace resistance to such ‘new constitutionalism’ in the form of contestation, innovation and transformation.

It is widely acknowledged by international organisations²⁴, civil society organisations,²⁵ and economists alike,²⁶ that neoliberalism is experiencing a crisis of sorts. Most notably, the IMF has itself published reports which question its utility, particularly in terms of its propensity to increase income inequality.²⁷ Not only did the global financial crisis expose the weaknesses of a global neoliberal capitalist model, more importantly, neoliberalism is causing deep income inequalities. The rich are becoming richer and the poor are becoming poorer. And arguably, what begins as financial crisis can spill over into conflict and social upheaval.²⁸ With law standing at the heart of the neoliberal model, it seems that much is at stake to unsettle the taken for granted and common sense attitude of lawyers to neoliberalism. This also means questioning the instrumental place that such revered notions as ‘constitutionalism’ can have in creating a deeply socially unjust structure.

1.3 Global constitutionalism and political economy

Applying, then, the emerging debates on the connections between international law and political economy to global constitutionalism may reveal the inner workings and biases of the global constitutional debate. The Framing Paper for this project names the following keywords: sovereignty, nation state, global legal order, global or international constitutionalism, constitutional pluralism, regional integration, public international law, international economic law, World Trade Organization (WTO), free trade agreement,

²⁴ ‘In it Together: Why Less Inequality Benefits All’, 21 May 2015, OECD report <http://www.oecd.org/social/in-it-together-why-less-inequality-benefits-all-9789264235120-en.htm>.

²⁵ ‘An Economy for the 1%. How privilege and power in the economy drive extreme inequality and how this can be stopped’, 18 January 2016, Oxfam report on structural inequalities <http://policy-practice.oxfam.org.uk/publications/an-economy-for-the-1-how-privilege-and-power-in-the-economy-drive-extreme-inequ-592643>.

²⁶ Thomas Piketty’s book *Capital in the Twenty-First Century* (Harvard: Harvard University Press, 2014) was particularly influential.

²⁷ Jonathan D. Ostry, Prakash Loungani, Davide Furceri, ‘Neoliberalism: Oversold?’ (2016) 53 *Finance and Development* 38-41. Available at <http://www.imf.org/external/pubs/ft/fandd/2016/06/pdf/ostry.pdf>.

²⁸ For an interesting short video overview, see Paul Mason ‘Capitalism is failing. It’s time to panic’ 12 August 2015 <http://www.theguardian.com/commentisfree/video/2015/aug/12/paul-mason-capitalism-failing-time-to-panic-video>.

human rights protection, legal culture and international cooperation.²⁹ An enquiry into political economy is a means to bring together all these keywords.

It may seem puzzling that the Introduction asserted a neglect of an analysis into the political economy of global constitutionalism when much of the discourse on international constitutionalism began with a scholarly debate on the constitutionalisation of the WTO. In the early 2000s, several scholars engaged in the question of whether the legalisation of the WTO (particularly given its highly legalised dispute settlement system) meant/should mean/should not mean the constitutionalisation of the WTO and the economic order more generally.³⁰ This literature was, however, largely concerned with the constitutionalisation of the trade regime, not of the international legal order as a whole. Given that neoliberal precepts have so permeated thinking on a national, inter- and transnational level, one cannot separate the economic order as pertaining simply to a commercial or trade sphere. The neoliberal order is at present the only true contender for global reach and due to this monopoly on the institutions, regulations, and imagination has become naturalised as the only way of ordering globally interconnected affairs. It follows therefore that those writing on global constitutionalism would not be aware of the particular political economic model they are assuming – they would most likely not have given it any thought. With this chapter, I hope to make a small contribution to changing this taking-for-granted of the neoliberal dimension of global constitutionalism.

The point of departure which I propose lies in the public/private dichotomy. Global constitutionalism and neoliberalism arguably meet and intertwine in the separation of the public and the private spheres. Ideas of constitutionalism have historically entailed a public/private division whereby the public sphere is considered as the political sphere and

²⁹ Takao Suami, Project Framing Paper, January 2013 (on file with the author).

³⁰ Ernst-Ulrich Petersmann, 'Constitutionalism and International Organizations' (1997) 17 *Northwestern Journal of International Relations* 398-469; Robert Howse and Kalypso Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far', in Roger B. Porter *et al.* (eds.) *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington DC: Brookings Institution Press 2001), pp. 227-252; Neil Walker, 'The EU and the WTO: Constitutionalism in a New Key', in Grainne de Burca and Joanne Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing 2001); Ernst-Ulrich Petersmann, 'Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society' (2006) 19 *Leiden Journal of International Law* 633-667.

the private sphere is the sphere of the economic.³¹ Neoliberalism encapsulates this division by promoting policies aimed at keeping the market separate and protected from state intervention. This private sphere of the economy is taken out of state control and therefore out of a form of democratic control. The private sphere, the sphere of the economic, is depoliticized. This rationale of the private sphere and deregulation is connected to the guiding principle of ‘the invisible hand’ – creating the fiction that law is not present in this sphere.³²

The public/private distinction, as one of the ‘grand dichotomies’ of Western thought,³³ is not a single paired opposition, but rather a complex network of oppositions.³⁴ To narrow the possible interpretations of this opposition down, I am interested in its evolution in legal history, in particular constitutional history as it relates to international law. There are several historical moments which have been explored in this regard. One might start with Roman law; one might start with Grotius and his discussions of the mercantile rights in the law of nations. I will follow Morton J. Horwitz’ starting point of the ‘double movement in modern political and legal thought’.³⁵ The significance in law appears to have evolved *conceptually* in new ideas of territorial sovereignty in the 16th and 17th centuries and *practically* with the industrial revolution and the notion of the market. As a response to the emergence of the nation state and notions of sovereignty (prompting ideas of a distinct public realm) in the 16th and 17th centuries, there also emerged a desire for a sphere which should be free from the power of the state (prompting ideas of a distinct private realm). John Locke had a profound impact on the distinction, advocating for a right to private property, which he derived from labour. However, as Horwitz states, it was not until the emergence of the market as a central legitimating

³¹ A prominent and familiar debate in which the collapse of the public into the private is emphasised could undermine the salience of the public/private distinction in constitutionalism. See eg Martha Minow, *Partners not Rivals: Privatization and the Public Good* (Boston, Mass.: Beacon Press, 2002). This often concerns the privatisation of public services such as education and healthcare. However, the abstract and symbolic distinction of the two spheres is still very much present in notions of global constitutionalism and, significantly, serves a particular ideological function.

³² Möller (note 11) 275.

³³ Norberto Bobbio, ‘The Great Dichotomy: Public/Private’ in *Democracy and Dictatorship: The Nature and Limits of State Power* (Oxford: Polity Press, 1997).

³⁴ Jeff Weintraub, ‘The Theory and Politics of the Public/Private Distinction’ in Jeff Weintraub and Krishan Kumar (eds.), *Public and Private in Thought and Practice. Perspectives on a Grand Dichotomy* (Chicago: The University of Chicago Press, 1997).

³⁵ Morton J. Horwitz, ‘The History of the Public/Private Distinction’ (1982) *University of Pennsylvania Law Review* 1423-1428.

institution in the nineteenth century that the public/private distinction was brought into the core of legal discourse.³⁶

Horowitz writes of the American legal academy furthering the separation between the different branches, designating public law fields (constitutional, criminal, regulatory law) and private law fields (torts, contracts, property, commercial law). This is attributed to a powerful contingent of orthodox judges and jurists who aimed to create a legal science that would sharply separate law from politics.³⁷ This project of creating a neutral and apolitical science of law was certainly not restricted to the US but was also (previously) pursued in Europe.³⁸ Law was to be separated ‘from what was thought to be the dangerous and unstable redistributive tendencies of democratic politics’.³⁹ Politics, then, is present in public law, but repressed as that which is irrational and biased, and is entirely missing in private law. Law schools have continued to teach this strict public/private divide and have caused the reproduction of the depoliticisation of law. Duncan Kennedy has highlighted that the core law school subjects, contract law, criminal law, property law, tort law are not built on the foundation of neutral reasoning, but are ‘the ground-rules of late nineteenth-century laissez-faire capitalism’. The primacy of property and restrictions on interference with the market are foregrounded as central values.⁴⁰ The rights to be protected are those reflecting the interests of private property owners, businesses, multinational corporations and financial capital. Private law, in this understanding, is a neutral system which facilitates voluntary market transactions and vindicates injuries to private rights.

The ideological meaning given to the public/private divide is twofold. First, the public must not intervene in the market. Second, law is apolitical. Law is regarded as a rational mechanism which can speak reason to power. Law is thought to have progressed to

³⁶ Horwitz (n. 35), at 1424.

³⁷ Horwitz (n. 35), at 1425.

³⁸ See Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001) for an account of this trend in international law, particularly Chapter 1 “The legal conscience of the civilized world” 11-97.

³⁹ Horwitz (n. 35), at 1425.

⁴⁰ See also Christine Schwöbel-Patel, ‘Teaching International Law Critically: Critical Pedagogy and *Bildung* as Orientations for Learning and Teaching’ in Bart van Klink and Ubaldus de Vries (eds.), *Academic Learning in Law: Theoretical Positions, Teaching Experiments and Learning Experiences* (Cheltenham: Edward Elgar, 2016).

become rational.⁴¹ Although the emphases and interpretations of global constitutionalism vary, the division between the political and the economic is largely assumed to be post-political, requiring no further justification. In global constitutionalism, it is taken for granted. Global constitutionalism, then, is employed, perhaps largely unwittingly, as a vehicle for neoliberalism.

2. Global constitutionalism and East Asian perspectives

This collection sets out to rethink ‘how both EU and East Asia can contribute to the construction of global legal order’.⁴² Moreover, it advances from the assumption that East Asian scholars have not *yet* joined the discussion on global constitutionalism.⁴³ The question which emerges from a political economy lens is: Would the debate with East Asian scholars imply a further naturalisation of the public/private divide and therewith a bias for neoliberalism? Or, alternatively, could this new dialogue provide an opportunity for decolonising global constitutionalism and its political economic bias?

2.1 Political economy of East Asia

These sections can only provide a very rough overview, with much detail being omitted and generalisations having to be made.⁴⁴ East Asia is not a monolithic whole and certainly the political economic emphases vary greatly. In regard to the ASEAN Plus Three, one could generally state that Japan and South Korea are more closely aligned with Western political and economic models (and it merits emphasising here that just as East Asia is not a monolithic whole, nor is the West with varying degrees of social democratic ideals incorporated), than China which is described as a socialist market economy.

It is relevant in this context that despite its peaks and troughs, overall East Asia has experienced great economic success in the past few decades.⁴⁵ China’s economic reforms (often referred to as ‘Reform and Opening up’) beginning in the late 1970s, and implemented in two stages, introduced market principles in the form of decollectivisation of agriculture, allowing private entrepreneurs to operate, the privatization of state-owned

⁴¹ See Francis Fukuyama, *The End of History and the Last Man* (London: Penguin, 2012).

⁴² Suami (n. 29).

⁴³ Suami (n. 29).

⁴⁴ See other chapters in this collection for a more complete view.

⁴⁵ Some of the troughs include Japan’s economic crisis in the 1990s, as well as widespread skepticism as to whether China has really grown at the rate that the national statistical office professes. Moreover, at the time of writing, there is debate over the end of China’s four-decade ‘growth miracle’.

industry and opening up the country to foreign investment. Politically, the Communist Party of China has been the sole ruling party since 1949. Japan is a constitutional monarchy, which draws much of its current political patterns from the time of the Allied occupation at the end of World War II. Overall, Japan is more integrated into the international system. South Korea, commonly simply referred to as Korea, is East Asia's most developed country according to the Human Development Index.⁴⁶ Overall, East Asia has emerged as one of the strongest regions in terms of economic clout and political influence.

The political economy of East Asia is of course a vast topic, which for lack of space and expertise, cannot be developed further here. Two issues of political economy are particularly relevant to this study: First, Deng Xiaoping, the Paramount Leader of China who led China through its major economic reforms, pursued the dictum that disputes regarding sovereignty and territorial integrity should be put to one side in order to further economic opening-up and modernization. This effectively created a distinction and isolation between the political and the economic where doing business together was enabled through a setting aside of territorial disputes.⁴⁷ Given that the separation of the political and the economic is in line with neoliberal and global constitutional tenets, this continued policy of China allows an insight into the potential dialogue on global constitutionalism with East Asia. Second, it is also relevant here that the East Asian states in question were central in displacing the relative hegemony of the North Atlantic political and economic centre. Given that the hegemonic potential (and possibly nature) of global constitutionalism has been exposed, it would seem relevant that a discourse between the former economic hegemon with the current economic hegemon would take place largely on terms most familiar to the former hegemon.

2.2 *East Asia and International Law*

Asia's relationship to international law has been described both as 'ambivalent' as well as 'selective'.⁴⁸ Simon Chesterman argues that Asia 'benefits most from the security and

⁴⁶ United Nations Development Programme, Human Development Reports, <http://hdr.undp.org/en/composite/HDI>.

⁴⁷ Jacques deLisle, 'Remarks by Jacques deLisle' (2013) 17 *Proceedings of the Annual Meeting (American Society of International Law)* 348-352.

⁴⁸ Simon Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present, Futures' (2017) 27 *The European Journal of International Law* 945-978; Jacques deLisle, 'China's

economic dividends provided by international law and institutions and yet is the wariest about embracing those rules and structures.⁴⁹ Regardless of whether one subscribes to this cost-benefit view, Asian countries are certainly cautious about certain aspects of international law and at the same time receptive to others. Although at risk of overgeneralisation (particularly as regards Japan), it can be claimed that East Asian states commonly assert traditional sovereign prerogatives. This approach to international law along the traditional Westphalian parameters of sovereignty, sovereign equality and non-intervention, is sometimes described as ‘Eastphalia’.⁵⁰

This ambivalence towards international law is often presented in its historical context. As noted above, international law played a central role in the imperial project, echoes of which are still evident in international law today. The exclusion of non-European states from full participation in international law was constructed on the basis of a civilisation bias which affected East Asian states profoundly.⁵¹ Japan was more successful than China in being admitted into the circle of civilised states. It was of course itself an imperial power (and the only non-Western world power in the late 19th early 20th century), ruling over Korea until defeated by the Allies in World War II. However, Japan came to experience its otherness in its post World War II occupation and transformation.⁵² In the meantime, China suffered what it refers to as ‘the century of humiliation’ from the mid 19th to the mid 20th century.⁵³ This began with the Opium Wars between China and, first and foremost, Britain. The Opium Wars were military interventions waged for the purpose of securing China as a trading ‘partner’ for the import of opium from Britain’s colony India. The quest was to legalise opium and to exempt it from any trade duties. In turn, Britain wanted access to Chinese tea, silk, and porcelain.⁵⁴ The unequal treaties and

Approach to International Law: A Historical Perspective’ (2000) 94 *American Society of International Law Proceedings* 267-275.

⁴⁹ Chesterman (n. 48).

⁵⁰ Chesterman (n. 48) rightly observes here that the sovereign prerogative, which is often coined an ‘Asian approach’ to international law, or ‘Eastphalia’, is in fact a traditional idea of Westphalian international law.

⁵¹ Chesterman (n. 48).

⁵² Chesterman (n. 48) in regard to the racial issues associated with the Tokyo trials, at 954.

⁵³ Eric Yong-Joong Lee, ‘Early Development of Modern International Law in East Asia: With Special Reference to China, Japan, and Korea’ (2002) 4 *Journal of the History of International Law* 42-76.

⁵⁴ P. W. Fay, *The Opium War 1840-42* (Chapel Hill: University of North Carolina Press, 1975); Brian Inglis, *The Opium War* (London: Hodder and Stoughton, 1976); Alain Peyrefitte, *The Immobile Empire—The first great collision of East and West—the astonishing history of Britain’s grand, ill-fated expedition to open China to Western Trade, 1792-94* (New York: Alfred A. Knopf, 1992).

the ceding of Hong Kong to Britain which resulted from China's defeat in the Opium Wars were bitter defeats. Chesterman observes that in order to understand Asian attitudes to international law it is not only important to note the humiliation which comes with colonialism but also the fact that the vast majority of Asian states 'literally did not participate in the negotiation of most of the agreements that define the modern international order'.⁵⁵

There are significant differences within East Asia as regards their attitudes to international law, but China's position in particular deserves some attention, given it is the largest in terms of territory and population and has experienced such remarkable economic growth.⁵⁶ Notably, the Chinese view on international law is described as instrumentalist in that it considers international law as an instrument of the state rather than a check on it.⁵⁷ Despite a prominent Asian values debate in the 1990s, and a subsequent embrace of relativism and/or pluralism, China today appears more flexible in regard to what has been termed 'conceptual' aspects of sovereignty as opposed to 'spatial'.⁵⁸ The latter refers to current territorial disputes in the South and East China Sea, as well as ongoing claims over Taiwan, Xinjiang, and Tibet. In terms of 'conceptual' aspects, China has signed most major UN-centred international human rights conventions as well as issuing a Human Rights White Paper, Action Plans, and other informal documents which engage with human rights obligations of China.⁵⁹ It is, however, also conceded that despite this official stance, this may in part be paying lip-service to conceptual aspects, given that sovereign discretion is still largely maintained.⁶⁰ One area of international law in which China is particularly active is in bilateral investment treaties. China is party to the second largest number of BITs overall, displaying a clear preference for (a) economic agreements and (b) bilateral as opposed to multilateral regimes. Although there has been a problematizing and pushback against the reigning supreme of

⁵⁵ Chesterman (n. 48), at 949. Examples he notes are The Hague Peace Conferences of 1899 and 1907, the signing of the League of Nations in 1919, the Bretton Woods Conference in 1944, and the establishment of the United Nations itself.

⁵⁶ Indeed, there are fears that China's current economic slowdown could have a major impact on the world economy.

⁵⁷ Chesterman (n. 48) 12.

⁵⁸ DeLisle (n. 47), at 351.

⁵⁹ DeLisle (n. 47), at 351

⁶⁰ DeLisle (n. 47), at 352.

neoliberal tenets in investment treaties and its fundamental investor-friendly approach,⁶¹ there is still no apparent alternative regime which contests the hegemony of the Washington Consensus.

Against this background of an ‘Eastphalian’ system of sovereignty, it is relevant that East Asia has generally not been at the forefront of efforts to ‘decolonise’ international law.⁶² Only few TWAIL scholars come from East Asia. This seems to point to an understanding of the instrumentalist vision of international law rather than an interest in it as a possible instrument for resisting hegemonic power of Western military and economic states. Naturally, this must be seen in relation to China’s position as, at the very least, a regional hegemon. Given these preconditions, it would seem that there would only be minor interest in discussions on global constitutionalism from a scholarly perspective, and even less so from a political perspective.

2.3 *East Asia and Global Constitutionalism*

This section sets the lack of political will to one side and questions what East Asian approaches to global constitutionalism may likely look like from a theoretical and practical perspective.

Domestic perspectives on constitutionalism are relevant here, just as they are for the Western scholars writing on global constitutionalism. It can generally be said that in parallel to international law’s European origins, constitutionalism is also a legal phenomenon brought to East Asia by the West, although not necessarily through colonialism. Japan’s constitutional history is interesting in this regard and tells a complex story. The Constitution of the Empire of Japan, or the Meiji Constitution, came into force in 1890 after a Japanese study mission was sent to various states (including the US, France, Spain, the UK and Germany) to enquire into the most appropriate form of constitutionalism for Japan. This study mission found the Prussian model to be particularly suitable to the Japanese context in its mix of constitutional and absolute

⁶¹ See for example Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (Cambridge: Cambridge University Press, 2010).

⁶² Although it is notable that China played an important role at the Bandung conference of 1955. On Bandung and International Law, see Luis Eslava, Vasuki Nesiah and Michael Fakhri (eds.), *Bandung, Global History and International Law: Critical Past and Pending Futures* (forthcoming Cambridge University Press). The relationships forged at the Bandung conference are sometimes invoked to explain China’s economic engagement in Africa ever since. See Denis M. Tull, ‘China’s Engagement in Africa: Scope, Significance and Consequences’ (2006) 44 *Journal of Modern African Studies* 459-479.

monarchy. This is not a story of direct imperialism. In contrast, the Meiji Constitution's successor, Japan's constitution of 1947 is widely regarded as 'imposed' on it as part of US General MacArthur's post World War II plans for economic, political and social change. Although studies have softened the 'imposition' supposition,⁶³ it can still be presumed that the occupying power exercised a great amount of influence on the initiation, drafting, and content of the constitution – not least given the fact that it was first written in English and only then translated into Japanese. Despite this, the Japanese post-war constitution is largely regarded a success, finding legitimacy with the Japanese people and considered an effective means of ensuring the rule of law.

Turning again to China: China's current constitution, the Constitution of the People's Republic of China, was adopted in 1982 under Deng Xiaoping's leadership. Modelled largely on the 1936 Constitution of the Soviet Union, China is declared a 'socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants'.⁶⁴ Despite having a constitution, China is criticised as not having constitutionalism given the absence of judicial review and the lack of popular participation in the enforcement of the constitution.⁶⁵ A central issue continues to be the question whether the constitution has the capacity to put a check on the actions of the Party and its leadership. As a general matter, China is suspicious of liberal constitutionalism, particularly regarding its potential for a dictatorship of the bourgeoisie.

A functioning or emergent regional constitutional regime is often viewed as a precursor to global constitutionalist thinking, hence the frequent reference to EU constitutionalism from advocates of its global interpretation. Asia has, as a general matter, not embraced regional unity through common regional institutions. According to its Charter, the Association of Southeast Asian Nations (ASEAN) serves legal and political purposes, to promote greater political, security, economic, and socio-cultural cooperation.⁶⁶ Despite the various intentions set out in the Charter, 'a noticeable lack of discourse over the role of law and institutions in promoting regionalism in this macro-region' has been

⁶³ Justin Williams, 'Making the Japanese Constitution: A Further Look' (1965) 59 *The American Political Science Review* 665-679.

⁶⁴ Article 1 Constitution of the People's Republic of China. The English text of the Constitution is available here: http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372963.htm.

⁶⁵ Zhang Qianfan, 'A Constitution without Constitutionalism? The Paths of Constitutional Development in China' (2010) 8 *International Journal of Constitutional Law* 950-976.

⁶⁶ Art. 1(2) of the ASEAN Charter.

observed.⁶⁷ This lack of enthusiasm for the role of law and institutions in East Asian regionalism may be indicative of a larger lack of enthusiasm for cooperation on constitutionalism on an international plane.⁶⁸

Domestic and regional constitutionalism do therefore not offer fertile ground for a flourishing debate on global constitutionalism in East Asia. The inflections of constitutionalism and international law which go beyond an instrumentalist approach are seen with suspicion, particularly by China. This has not, of course, inhibited economic relations. Indeed, one could say that economic relations are flourishing, with East Asia being a major export and import region; in addition, investment in the region as well as by its constituent states in other parts of the world are thriving.⁶⁹ Overall, one could state that given the accepted differences in regard to the public-political landscape, a consensus is commonly sought within the economic sphere. As was mentioned above, this is reflected in the comparatively high number of bilateral trade agreements vis-à-vis multilateral treaties around the common rights.⁷⁰ The economic is the area in which East-West relations are at their least contested. But this also tells us something about the division of the political and economic in that trade and investment agreements are largely regarded as *apolitical*. This seeming neutrality of the market is, as was argued above, a distinct feature of neoliberalism. Despite different ideological foundations, the inherent neoliberal flavour of a separation of the public from the private and the attendant separation of the political from the economic reigns supreme. In other words, although its economic influence is not based on a straight-out neoliberal programme which tries to minimise state intervention in the market, China is also not posing a threat to the unrivalled Washington Consensus paradigms.⁷¹

Constitutionalism is revealed, then, to be a distinctly political project, on the domestic, regional and global levels. As a political (and social) project, constitutionalism serves the interests of some over others. In the global context, which we are interested in, constitutionalism in East Asia is far more likely to serve private interests, corporate

⁶⁷ Nakamura (ed.), *East Asian Regionalism* (n. 1), p. xv.

⁶⁸ Nakamura (ed.), *East Asian Regionalism* (n. 1) for an effort to address this.

⁶⁹ The establishment of the Asian Infrastructure Investment Bank (AIIB) of 2015 is of note here.

⁷⁰ Tommy Koh, 'International Law and the Peaceful Resolution of Disputes: Asian Perspectives, Contributions, and Challenges, (2011) 1 *Asian Journal of International Law* 57-60.

⁷¹ Sarah Babb, 'The Washington Consensus as Transnational Policy Paradigm: Its Origins, Trajectory and Likely Successor', (2013) 20 *Review of International Political Economy* 268-297.

interests, and their institutions rather than follow a universal higher moral code. This is because (a) the constitutional form is already biased towards a separation of the public and private, thus depoliticising the sphere of the private, and (b) the constitutional form has the ability to ‘lock in’ of ‘fix’ programmes and principles which serve certain purposes and interests.⁷² The implication of an East-West dialogue on global constitutionalism would then, perhaps inadvertently, be a further deepening of the separation of the market and therefore the continued inaccessibility of mechanisms of redistribution in the political sphere. Such a trend in thinking, or in the institutionalisation of this thinking through global constitutionalism, could ultimately mean the deepening of economic and social inequality.

2.4 Opportunities?

The conversation with East Asian scholars and practitioners regarding global constitutionalism may, on the other hand, provide some opportunities: It may unearth the hitherto neglected debate on political economy, requiring that which has been naturalised to be spelled out. Neoliberalism’s limits have, particularly in the past years, become prominent. Sovereign debt, the global financial crisis, the Greek (and other European) crises, rising economic inequality, the rise of national populism are all symptoms of the problems with neoliberalism. This realisation could not only provide the opportunity to rethink global constitutionalism, it could also provide the opportunity to rethink the basis of the predominant economic order. Could this be the introduction of the political into the economic/private sphere?

Despite the appeal of this proposition, there are some hurdles which are almost impossible to overcome. First, a common lowest denominator, however loose, would need to capture not only the diverse inter-national laws and practices but also, crucially, the trans-national laws and practices on a non-normative basis. Even in a loose form of constitutionalism, that of an ‘attitude, a frame of mind’,⁷³ some form of fixing within moving processes is required. And if one takes values out of the debate, and if one takes the legal form out of the debate, what does this leave us with? Only again an agreement

⁷² Stephen Gill, ‘New constitutionalism, democratisation and global political economy’ (1998) 10 *Pacifica Review: Peace, Security & Global Change* 23-28.

⁷³ Jan Klabbers, ‘Setting the Scene’ in Jan Klabbers, Anne Peters, Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), p. 10.

that ‘doing business’ without enquiring into values has worked in the past. The political in terms of a democratic and inclusive process would most likely, in practical terms, be factored out. An example of this may be detected in China’s approach to the disputes arising from the territorial claims made on the South and East China Seas. Chinese policy is to ‘set aside’ sovereignty questions to seek cooperation on practical matters such as resource development.⁷⁴

Second, the close link between global constitutionalism and international law would, it seems, be an inhibitor. A common framework, even in a minimalist sense, would need to somehow capture laws and practices which derive from increasingly diverse and multiple local, regional and global locations involving both state and nonstate authorities and state and nonstate law.⁷⁵ Not even international law is able to capture these multiform processes and events,⁷⁶ so why would a global constitutionalism? So long as international law is unable to account for the role of law in the *constitution* (as in construction) of local and global political economies, its decolonisation through a debate on commonalities with non-Western actors is unlikely. Notwithstanding the fantastic efforts of scholars from the Global South to engage in this largely Eurocentric debate,⁷⁷ I believe that there is not likely to be much scope for opening global constitutionalism to a truly global idea.

Third, and in a related vein, the necessity for constitutionalism’s form to capture dynamic processes, even if for a short time only, in fact has a depoliticising effect. Constitutionalism is in this sense ‘a mechanism for withdrawing controversial and potentially destabilising issues from the parry and thrust of ordinary politics to a less inclusive constitutional domain’.⁷⁸

Fourth, aside from these structural biases of the global constitutionalist idea, there is unlikely to be a concomitant political will relating to such efforts. Global

⁷⁴ DeLisle, 2013 (n. 47), at 352.

⁷⁵ Claire Cutler, *Private Power and Global Authority* (n. 21), p. 2 describes this as the ‘new transnational legal order’.

⁷⁶ Claire Cutler, *Private Power and Global Authority* (n. 21), p. 2. And this brings us, in a somewhat circular fashion, to the debate on global governance. Dunoff has observed in this context that the constitutional debate is self-defeating in that it ‘is less a sign of international law’s flourishing than of it being in a state of crisis’, Jeffrey L. Dunoff, ‘Constitutional Conceits: The WTO’s “Constitution” and the Discipline of International Law’, (2006) 17 *European Journal of International Law* 645-675, at 669.

⁷⁷ E.g. Daniel Bonilla-Maldonado, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Colombia* (Cambridge University Press, 2013).

⁷⁸ Jeffrey L. Dunoff, ‘The Politics of International Constitutions: The Curious Case of the World Trade Organization’ in Dunoff and Trachtman (eds.), *The Politics of International Constitutions* (n. 16), at 179.

constitutionalism remains a scholarly debate and there is not a whiff of governmental, civil society, or policy interest in it to date.

Conclusion

At the beginning of this chapter it was asserted that the debate on global constitutionalism has at its core the question of whether it can contribute to addressing some of the world's largest problems? In other words, can it contribute to a more equal, prosperous, sustainable, and overall better life of humankind? This chapter has highlighted how the neglected enquiry into the political economy of global constitutionalism is a crucial question in order to get a little closer to answering these ambitious questions. It was found that global constitutionalism, with its central parameters of political liberalism emphasising the division of the public and the private, plays into the hands of a neoliberal political project by depoliticising the economic sphere. Global constitutionalism, if enforced or institutionalised beyond its European birthplace, would be unlikely to democratise or decolonise global constitutionalism. Rather, it would more likely be a further vehicle for the naturalisation of neoliberalism, and at the very least maintain the status quo.